83-296

In the
Supreme Court of the United States
October Term, 1983

No.

ROBERT A. LEBOVITZ,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HAROLD GONDELMAN
GONDELMAN BAXTER McVERRY
SMITH YATCH & TRIMM
Attorneys for Petitioner

718 Fifth Avenue
Pittsburgh, Pennsylvania 15219
(412) 765-2500

QUESTION PRESENTED FOR REVIEW

The Court of Appeals for the Tenth Circuit in United States v. Tager, 638 F.2d 167 (10th Cir. 1980), set aside the conviction of an attorney for the reason that the secrecy of the grand jury had been violated by disclosure of matters occurring before it, including grand jury transcripts, to an employee of the Insurance Crime Prevention Institute and on remand the indictment was subsequently dismissed. The Court of Appeals for the Third Circuit has affirmed the conviction of an attorney although the record in the court below establishes that the secrecy of the grand jury had been violated by disclosure of all physical evidence and

the essence of testimony of witnesses appearing before the grand jury to an employee of the same Insurance Crime Prevention Institute and where that employee acted as the alter ego of the postal inspector in charge of the over five-year investigation. The decisions of these two courts of appeals are in conflict in the interpretation of Federal Rule of Criminal Procedure 6(e)(2) and in guarding the historical impartiality and independence of the grand jury guaranteed by the Fifth Amendment, for which reason the petition for certiorari should be granted and the conflict resolved by this Court.

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Robert A. Lebovitz petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The Judgment Order of the Court of Appeals for the Third Circuit entered

June 7, 1983 affirming the court below without opinion is attached hereto as Appendix A, infra (1a-3a).

The Order of the Court of Appeals for the Third Circuit entered July 19, 1983 denying the petition for rehearing and hearing by the court en banc is attached hereto as Appendix B, infra (4a-5a).

The sealed Memorandum and Order of the United States District Court for the Western District of Pennsylvania entered November 17, 1982 denying defendant's motions to dismiss the indictment, for a new trial and other appropriate relief and sanctions is attached hereto as Appendix C, infra. (6a-34a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ..."

Federal Rules of Criminal Procedure 6(e), set forth in Appendix G (53a-55a).

STATEMENT OF THE CASE

Robert A. Lebovitz is an attorney who was indicted for mail fraud (18 U.S.C. 1341) and conspiracy (18 U.S.C. 371), in the United States District Court for the Western District of Pennsylvania and was tried and convicted. The judgment of conviction was affirmed by the Court of Appeals for the Third Circuit, United States v. Lebovitz, 669 F.2d 894 (3d Cir. 1982), cert. den., 102 S.Ct. 1979 (1982).

After the affirmance of his judgment of conviction, Lebovitz and his counsel became aware of the fact that the indictment resulted from the participation of a non-government employee employed by the Insurance Crime Prevention Institute who had access to all

of the evidence, memoranda of interviews and had conducted interviews of witnesses who appeared before the indicting grand jury.

On May 3, 1982, Lebovitz moved to dismiss his indictment, for a new trial and other appropriate relief and sanctions on grounds of breaches of grand jury secrecy and flagrant and persistent prosecutorial abuses in violation of the defendant's Fifth Amendment rights and violation of Rule 6(e) of the Federal Rules of Criminal Procedure and requested that the court invoke its supervisory power to correct the abuses. These motions were denied by the lower court on November 17, 1982. On June 7, 1983, the Court of Appeals for the Third Circuit affirmed the conviction. A petition for rehearing

was timely filed and denied on July 19, 1983. A petition to stay the issuance of a certified judgment pending filing a petition for certiorari to the Supreme Court was timely filed. A stay was granted to August 25, 1983 and shall continue until final disposition by the Supreme Court.

The investigation leading to the indictment of petitioner began early in 1977 and involved allegations of insurance fraud aginst doctors and lawyers in the Pittsburgh area through submission of false and inflated medical bills to insurance carriers in connection with personal injury damage claims. The Insurance Crime Prevention Institute (ICPI) is a national criminal investigative organization established by the insurance industry in 1971. Daniel B. Saccani was the employee of

that Institute engaged in the investigation of petitioner and had been an employee since 1971.[1/] Saccani had testified that his duties after he was appointed an agent of the federal grand jury in Pittsburgh did not change in any respect and that he could not distinguish when he acted as an employee of ICPI as opposed to when he was acting as an agent of the grand jury. The grand jury which appointed him expired and petitioner was indicted by a subsequent grand jury.

Search warrants were issued and files of the petitioner seized by the postal inspectors. The daily logs of

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1/ Saccani's salary was paid from non-voluntary assessment of approximately 400 member insurance companies.

Saccani introduced before the court below indicated entries of the type dated July 19, 1979 in which Saccani stated, "Assisting Inspector Morgan in adding additional information to the affidavit for search warrant at the request of USA Curry." Morgan is a postal inspector and Curry is an Assistant United States Attorney. The daily log also showed that Saccani was aware that the search warrant was approved for the search of petitioner's law firm office and the securing of files. The record is replete with statements such as "Reviewing and analyzing attorney files obtained by postal inspector in a search of the law office of Lebovitz, Lebovitz and Kwall." (July 25, 1979); "also reviewing and analyzing seized attorney

records with postal inspector Robert Morgan." (July 27, 30, 1979).

Recognizing that the conviction cannot now be attacked, nevertheless it is apposite to note that the trial court indicated during trial that the indictment was confusing and in fact the trial court stated, "It is the most outrageous indictment I ever saw. . ." The caliber of the testimony was reflected by the trial court's statement to defense counsel when improper testimony was objected to that "You're going to get a verdict of not guilty. What's the difference?"

Despite the above, on March 5, 1981, after petitioner was convicted, he was sentenced to concurrent prison terms of one year and a day, fined a total of $14,000.00 plus costs of prosecution.

On February 3, 1981, several days after petitioner's conviction, an indictment was handed down in United States v. Litman and Portnoy, Criminal No. 81-16 (W.D. Pa.). The factual investigation and involvement of Daniel B. Saccani, a private citizen, first came to the attention of petitioner and his trial counsel on May 3, 1982 after the proceedings in Litman-Portnoy were unsealed. The proceedings were unsealed after the Court of Appeals for the Third Circuit felt it inappropriate to consider the merits of appellants' challenges to the indictment based upon Saccani's involvement at that stage of the proceedings. 661 F.2d 17 (3d Cir. 1981), cert. den.,, 102 S.Ct. 1016 (1982).

In the Litman-Portnoy case, Chief Judge Weber, of the United States District Court for the Western District of Pennsylvania found:

> "There have been repeated and continued violations of the provisions of Federal Rule of Criminal Procedure 6(e)(2) from and after its effective date of August 1, 1977 until the return of the indictment which concern the proceedings of several grand juries sitting in this district... Because of the related nature of these cases and the appearance of the same doctors in several of the related cases it is impossible to segregate the grand jury testimony between the cases. . . ." (App. 28a) 2/

In the Litman-Portnoy case, Judge Weber in Finding of Fact 17 referred to a report of loss, compromise or

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2/ Appendix page numbers, unless preceded by reference to Appendix A through G, refer to Court of Appeals Appendix.

suspected compromise of the grand jury process written by the then United States Attorney on November 14, 1980 to the Assistant Attorney General for the Administration of Justice, in which he reported:

> ". . . that there are any number of possible 6(e) problems arising out of the lawyer-doctor insurance mail fraud investigations. He recited that the ICPI investigator's presence at extensive pre-grand jury debriefing made the investigator aware of the full extent of testimony without reference to the grand jury transcript." (App. 25a)

United States Attorney Cindrich also referred to the fact that non-governmental personnel (Saccani and others) were present at interviews where witnesses were questioned by the use of records which had been obtained by grand jury subpoena and which were grand jury exhibits. (App. 52a-54a).

After almost eight weeks of trial in which the government presented its case against Litman-Portnoy, a motion for judgment of acquittal was granted on December 1, 1982, 131 PLJ 79 (1982). (App. D, 35a-40a) The court refused to allow a jury to decide guilt or innocence on the same confused testimony of Drs. Rosenbloom and Pincus as appeared in petitioner's case.

David L. Lichtenstein, an attorney, was indicted on April 18, 1980 to Criminal Action No. 80-78. On a motion to dismiss the Lichtenstein indictment, Judge McCune found that Saccani acted as a postal inspector and became the alter ego of the postal inspector who was identified as the head of the fraud investigation of attorneys and doctors. United States v. Lichtenstein, 131 PLJ 85 (W.D. Pa. 1982) (App. E (41a-44a)

The record established that postal inspector Siano, who headed the lawyer-doctor investigation, testified:

> "He (Saccani) participated in the investigations in almost, I would say, a parallel position as a postal inspector." (App. 49a) (Emphasis added)

In connection with the investigation being conducted by the grand jury, Saccani, the private individual, testified that he could not recall anything that Postal Inspector Morgan did exclusively in connection with the investigation in which Saccani did not participate. (App. 208a)

Judge McCune also found that although Saccani did not go into the grand jury room or review transcripts of testimony directly, he knew "what each witness was going to say and what documents were to be presented because

he knew as much about the investigation as Siano knew." (App. E, 43a). Saccani himself testified that he knew what they were going to say in the grand jury room before they went in. (App. 38a) It was also established that there was no instance when a grand jury witness testified differently from the memorandum of interviews which Saccani had access to and in fact read and analyzed. (App. 279a, 280a) In re Special February, 1975 Grand Jury, 662 F.2d 1232 [Baggot], (7th Cir. 1981), aff'd. 103 S.Ct. 3164 (1983), the court of appeals concluded Baggot's Memorandum of Interview Statement was no less significant that the transcript of the grand jury proceedings nor was Rule 6(e) avoided by the government's making notes for the file in a document, "Memorandum to File." The court noted

interviews resulting from grand jury subpoenas would be part of the grand jury and subject to Rule 6(e). Regarding the special agent's report consisting of the agent's summary of the case and recommendations, an analysis of documents and summaries of the witness interviews, the government conceded that those parts of the report which contained grand jury testimony would be governed by Rule 6(e). The government sought certiorari limited to the question of whether IRS audit was "preliminary to or in connection with a judicial proceeding under [c][i]."

The lack of impartiality of the employee of the insurance industry as found by Judge McCune is shown by the fact that he kept a chart indicating in red those who had been indicted and he reported to his superiors at ICPI that he looked forward to the day when all

which meant that all doctors and lawyers investigated by him had been indicted and convicted. Lebovitz's name appeared on that chart. (App. E, 43a; App. 381a).

Judge McCune, aware that his ruling would preclude retrial, as well as the trial of a similar action charging defendant Lichtenstein with conspiracy and mail fraud, suppressed all evidence consisting,

> ". . . of the documents produced in compliance with grand jury subpoenas, that evidence seized on the basis of the search warrant for the law firm which Saccani helped prepare on the basis of the grand jury's documents, and the statements of the witnesses, whom he briefed or debriefed before or after they testified before the grand jury." (Appendix E, 44a)

In camera hearings were held on petitioner's motion before Judge Marsh. Relevant parts of the Litman-Portnoy

record were incorporated by reference. The record established that as early as September 16, 1977, Saccani met with Postal Inspectors Siano and Trainor and his daily diary indicated

> "All material evaluated. Were able to show a pattern with four law firms and 8 doctors, plus other information from confidential sources." (App. 403a)

Saccani participated with Inspector Morgan in interviewing nine clients involving this petitioner and who were identified by matters secured under subpoena by the October 28, 1977 grand jury. (App. 352a-353a) The affidavit of probable cause for the search warrant executed on July 25, 1979 by Postal Inspector Russell L. Siano improperly states that five of the eleven persons identified were interviewed. Had the magistrate received

information concerning all of the interviews, a search warrant may well not have issued, there being no probable cause, again to the prejudice of petitioner.

On June 27, 1979, Inspector Morgan scheduled interviews for clients John Sochacki and Joan Posa. (App. 399a) The mail fraud counts 6 through 14 and conspiracy count 1 concern the Sochacki-Posa accident and Sochacki, who was present during the Posa interview, indicated Morgan and Saccani tried to put words in the mouths of Sochacki and Posa. (App. 395a) Although Sochacki was subpoenaed before the grand jury, he was not permitted to testify and he was never recalled to a grand jury although his testimony was totally exculpatory of petitioner. (App. 394a)

The record made in the court below is replete with references to the fact that Saccani had identification as a special agent which was designed to create the false impression that he was a postal inspector; that he met with the Assistant United States Attorney Curry and Inspector Morgan for pre-grand jury work and prepared files for grand jury work (App. 347a); he was present for grand jury work on November 13, 1979, when eight important witnesses appeared before the grand jury and he briefed them; he debriefed doctors and individual patients and others (Findings of Fact 16 through 28, App. C, 16a-19a).

It is significant to note that the court below found as fact (Finding of Fact 28) that Saccani was a valuable aid in the investigation and other

investigations. This was due to the fact that Saccani was privy to secret grand jury matters in flagrant violation of Rule 6(e). It is also apposite to note that the record shows extensive involvement by Saccani in every facet of the grand jury investigation, and the court rejected the government's argument that Saccani did nothing more than clerical work.

Saccani's daily logs, which were admitted in evidence, indicate the extensive contact he had with postal inspectors and grand jury data. (App. 337a-357a, inclusive) He met frequently with Postal Inspectors Siano, Morgan, Trainor and Baumann, as well as Assistant United States Attorneys. He

met with Inspector Morgan to review Morgan's grand jury testimony summarizing the government's case on the day the indictment was handed down. (App. 174a, 341a) Saccani saw a copy of Inspector Siano's letter summarizing evidence from a number of sources including grand jury testimony (App. 24a) and was present during a meeting with the United States Attorney where a grand jury transcript was discussed with references to pages and possible conflicting statements of Dr. Rosenbloom, a key witness involved in petitioner's case. (App. 53a, 409a) He served grand jury subpoenas, knew names of witnesses scheduled to appear before the grand jury, the time scheduled. He knew the targets of the investigation, when indictments would be sought, and

gathered grand jury materials for assistance in preparing the presentation letter summarizing the case. (App. 117a, 178a, 344a) He prepared reports, charts and memoranda, and he accompanied Inspector Morgan to Assistant United States Attorney Curry's office to officially present the case. (App. 178a, 344a) Saccani was present during interviews in which grand jury records were used to question the witnesses. (App. 52a) He reported information generated by grand jury subpoena to ICPI personnel. (App. 329a-357a). The government did not produce any disclosure statements required under Rule 6(e)(3)(B) for government employees, nor for Saccani, a non-government employee. The government failed to seek any court approval

concerning disclosures to ICPI Agent Saccani and there is no procedure to have allowed it.

In spite of the fact that Saccani had been made an agent of the grand jury which expired in March, 1979 and that grand jury had not indicted either Lebovitz, Litman, Portnoy or Lichtenstein and Saccani had continued to act as an agent of the grand jury as well as an agent of the ICPI without distinction between the two, the court below made the erroneous Finding of Fact 34:

> "In the Litman case, Saccani was made an agent of the grand jury. He was not made an agent of the grand jury in the Lebovitz case. This factor adequately distinguishes his actions in the Lebovitz case from his actions in the Litman case."

The trial court has misinterpreted the arguments made in connection with the violation of the secrecy of the

grand jury. The court below found that Saccani had not violated his oath of secrecy. 3/ The issue presented, however, was that Saccani was not entitled to the information which he possessed and the secrecy of the grand jury was violated when he had access to all of the files, documents, memoranda of interviews and had conferences with the Assistant United States Attorneys and postal inspectors in which all

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3/ This finding is not supported by the evidence since Saccani reported his activities to his civilian superiors regularly. See Finding of Fact 14 (App. 365a) ICPI notified Kemper Insurance, "We will notify you of our findings in capsule form on the 10th of each month and we will inform you in greater detail every 60 days. We will also advise you of all significant developments as they occur." (App. 330a, 331a)

facets of the investigation were discussed.

During the proceedings in the court below demand was made for the presentation letter so that defense counsel could determine what matters Saccani had knowledge of since it had been discussed with the United States Attorney and with the postal inspectors. The court even refused to examine the presentation letter in camera. (App. 291a)

In United States v. Lichtenstein, supra, Judge McCune provided the presentation letter to defense counsel upon request. (App. 380a, 381a) Defense counsel was able then to establish and the court concluded that the presentation letter prepared with the assistance of Saccani revealed the

involvement of three physicians not known to the authorities until the search of the Lichtenstein law office. The court found that an attack upon the search warrant would be justified, ". . . because Saccani helped to prepare it and because he had been given the grand jury documents upon which it was based, among other reasons." (App. E, 43a) The review of the presentation letter and its exhibits was essential in order to establish the totality of involvement by Saccani.

Saccani's breaches of grand jury secrecy were understandable in that he possessed a complete misunderstanding of the historical function of the grand jury in American law. He believed that the grand jury existed only to preserve the testimony of a witness who appeared before it. He testified that the grand

jury function was to preserve the evidence and that a witness would run in to say under oath what they had already told us originally in the memoranda of interview. (App. 86a, 358a)

The trial court erred in limiting the United States Court of Appeals' decision in United States v. Tager, supra, which held the disclosure of grand jury materials to an Insurance Crime Prevention Institute employee was illegal, even though authorized by the court.

The uncontradicted testimony in United States v. Litman-Portnoy, United States v. Lichtenstein, and United States v. Lebovitz, supra, establishes that Saccani was the alter ego of the

postal inspectors; that he was appointed as an agent of a grand jury without any authority in law or fact or Federal Rules of Criminal Procedure; that the grand jury which appointed him expired and thus his purported agency expired but he nevertheless continued to act as an agent of the grand jury; that his activities as an agent for the Insurance Crime Prevention Institute were exactly the same as his duties as a purported agent of the grand jury but he was not paid by the United States of America, he was only paid by the private industry which was pushing the investigation; that he was aware of what witnesses testified to before the grand jury because he had been given their memoranda of interviews and either briefed them before or after they appeared before the grand jury.

Despite the flagrant abuses of the secrecy of the grand jury proceeding, the conviction of petitioner stands and petitioner faces a year and a day in prison while the record in the court below indicates that the same activity by employees of the ICPI has been successfully attacked in the Tenth Circuit Court of Appeals and in the District Court for the Western District of Pennsylvania.

REASONS FOR GRANTING THE WRIT

In United States v. Tager, supra, grand jury transcripts were made available to an employee of the same insurance industry agency, the ICPI. In the Tager case the United States Attorney at least had the humility to ask the court to allow the private

citizen to see grand jury transcripts. Even with the court's approval, the Court of Appeals for the Tenth Circuit held that the grand jury transcripts and materials could not be made available to a private citizen under the circumstances and that the conviction of the attorney in the Tager case had to be reversed and the indictment dismissed. The case was remanded to the United States District Court for the District of Kansas and Judge Theis sustained defendant's motion to dismiss the indictment (Appendix F, 45a-52a). Judge Marsh attempted to distinguish the Tager case on the fact that the ICPI agent saw transcripts of grand jury testimony whereas in the instant

case Saccani did not see the transcripts. [4/] However, as Judge McCune found in the Lichtenstein case Saccani did see the memorandum of interview of witnesses and since in no instance did the witness testify differently before the grand jury, Saccani was intimately aware of what their testimony was before the grand jury.

In United States v. Lichtenstein, supra, the trial court suppressed evidence which resulted from search warrants, grand jury subpoenas and witnesses who were briefed or debriefed by the same Daniel B. Saccani who performed the same functions against your petitioner. The government has not appealed the Lichtenstein decision

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4/ This argument was rejected at 662 F.2d 1232, page 17, infra/

and it remains the law in the Western District of Pennsylvania except for your petitioner.

The Court of Appeals for the Third Circuit in other cases has given the grand jury secrecy requirements the high priority and importance which it deserves. In In Re Grand Jury Matter Garden Court Nursing Home, Inc. and Sidney D. Simon, 697 F.2d 511 (3d Cir. 1983), it was held that grand jury transcripts, memoranda of interviews and auditors' analyses could not be disclosed to state officials even after the subject of the grand jury proceedings had been indicted and plead guilty. That case arose on application by the government to disclose the matters in a manner which would comply with due process whereas in the proceedings resulting in the indictment of

your petitioner the government disclosed the matters through the Assistant United States Attorney, which fact was not even known to the petitioner until after his conviction.

In United States v. Serubo, 604 F.2d 807 (3d Cir. 1979), the court recognized that the only effective way to encourage compliance with ethical standards and protect defendants from abuse of grand jury process is by the dismissal of an indictment without requiring an individual defendant to show prejudice to satisfy the exercise of the court's supervisory power.

In the case of Illinois v. Abbott and Associates, Inc., et al, 460 U.S. _____, 103 S.Ct. 1356, 75 L.Ed.2d 281, 51 U.S.L.W. 4311, decided March 29, 1983), this Court has affirmed the

traditional concept of the high priority accorded to secrecy of grand jury proceedings and would not permit the disclosure of grand jury matters to even the attorney general of a state under Section 4(f) of the Clayton Act. The contention that the Clayton Act made it unnecessary for the state attorney general to meet the particularized need standard under Rule 6(e) was rejected by this Court and it was pointed out that Rule 6(e) of the Federal Rules of Criminal Procedure codifies a long-standing rule of common law which has been recognized as "an integral part of our criminal justice system." The only exception to the general prohibition against disclosure without prior court approval is limited

to federal government personnel performing a specified law enforcement function.

This Court, June 30, 1983, held that under the disclosure rules of 6(e) disclosure could only be made to a government attorney or employee who assisted in the criminal matter under investigation and could not be disclosed to a civil division Justice Department attorney. The requirement under the Rule for disclosure to such an employee would only be on a showing of particularized need and by court approval. United States v. Sells Engineering, Inc., 103 S.Ct. 3133. The recent cases of Illinois v. Abbott, supra, United States v. Sells Engineering, Inc., supra, and United States v. Baggot, supra, reaffirm the

sanctity of the principle of grand jury secrecy by this Court.

In United States v. Tager, supra, the Tenth Circuit properly held that an ICPI representative could not have access to grand jury materials and stated:

> ". . . the drafters of (A)(ii) considered whether the assistance of private persons like Mr. House should be included. They decided against such inclusion by limiting (A)(ii) to 'government personnel'. . . . We must hold that subsection (C)(i) 'is not designed nor has it been used in the past as a source of authority for a court to order disclosure to assist with the present grand jury proceedings." 638 F.2d 167, at 170.

This Court has repeatedly held that the grand jury system requires secrecy of its proceedings. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-19, 99 S.Ct. 1667, 1672-

73, 60 L.Ed.2d 156 (1979); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398-99, 79 S.Ct. 1237, 1240, 3 L.Ed.2d 1323 (1959); United States v. Proctor & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed. 2d 1077 (1958). In Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364 at 1373 (1962), Chief Justice Warren emphasized the grand jury's role in securing protection against vindictive prosecution when he held:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious, and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." (Emphasis added)

On April 23, 1980 this Court ordered an amendment to Federal Rules

of Criminal Procedure 6(e).

> (6) Sealed records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

This Court recognized that by keeping such documents as grand jury subpoenas and immunity orders under seal, grand jury secrecy would be assured and protected.

In the case of In Application of State of California, 195 F.Supp. 37 (E.D.D.C. Pa. 1961), Judge Ganey, later of the Court of Appeals for the Third Circuit, stated that the names of witnesses subpoenaed and used by the grand jury and the documentary evidence presented to it are protected by the requirements of grand jury secrecy. In

Re Grand Jury Matters, 682 F.2d 61 (Catania) (3d Cir. 1982), products of an FBI investigation were held not have been generated by the grand jury and could therefore be released to the state district attorney. However, the court refused to allow the disclosure of grand jury materials which were requested.

In Re Grand Jury Investigation, 610 F.2d 202 (Lance) (5th Cir. 1980), the court held that the secrecy provisions of Rule 6(e) applied not only to disclosure of events which have occurred before the grand jury but also to disclosure of matters which will occur, such as statements which reveal the identity of persons to be called before the grand jury, when the grand

jury will return an indictment, the nature of the crimes charged. Saccani was aware of when the indictments were going to be returned and in fact had an opportunity to review the indictments before they were returned.

The Judicial Conference Advisory Committee on the Federal Rules of Criminal Procedure has found that the potential for abuse of grand jury process is real and has proposed access to grand jury material absent court order only to government personnel enforcing criminal laws. 102 S.Ct. 2 (11/15/81) pp. 1-31.

In United States v. Hastings, ___ U.S.____, 103 S.Ct. 1974 (decided May 23, 1983), Mr. Chief Justice Burger citing McNabb v. United States, 318 U.S. 332, 64 S.Ct. 608, 87 L.Ed. 819

(1943) identified the threefold purpose underlying the use of the supervisory powers of the court, namely, (1) to implement a remedy for violation of recognized rights, (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, (3) as a remedy designed to deter illegal conduct. It was also held that errors may involve rights so basic to a fair trial that their infraction can never be treated as harmless error. 103 S.Ct. at 1980, n.6.

In Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956), this Court observed:

> This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this

> regard, it is to see that the waters of justice are not polluted."

Indictments have been dismissed where grand jury secrecy has been violated. See United States v. Helstoski, 635 F.2d 200 (3d Cir. 1980), violation of speech and debate clause; United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), repeated use of hearsay evidence before the grand jury. In United States v. Serubo, supra, the Third Circuit had previously recognized that:

> "[P]rejudice to the individual defendant has never been required in order to justify the exercise of the supervisory power. . . . the federal courts have an institutional interest, independent of their concern for the rights of the particular defendant in preserving and protecting the appearance and the reality of fair practice before the grand jury, an interest which could justify the imposition of a prophylactic rule in a proper case. . . .

> We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with these ethical standards, and to protect defendants from abuse of the grand jury process."

See e.g. Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646 (1976).

United States v. Gold, 470 F.Supp. 1336 (D.C. Ill. 1979), ordered a dismissal of the indictment for, inter alia, violation of Rule 6(e). The court found the undermining of the grand jury process which destroyed its independence and deprived the defendants of their Fifth Amendment rights by the participation of a party who at the time was neither an attorney for the government nor an agent of the government. See also, United States v. Braniff Airways, Inc., 428 F.Supp. 579

(D.C. Texas 1977); United States v. McKenzie, 524 F.Supp. 186 (E.D. La. 1981). United States v. Phillips Petroleum Co., 435 F.Supp. 610 (N.D. Okla. 1977).

This Court has set aside a conviction without requiring a showing of prejudice in Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628 (1965), and held:

> ". . . At times a procedure employed by the state involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

381 U.S. at 543-544. Also in Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546 (1975), two key witnesses at the trial were deputy sheriffs who doubled as jury shepherds and although it was a petit jury and the deputies swore they had not talked to the jurors about the case, this Court held relief was constitutionally mandated stating:

> ". . . Even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association."

379 U.S. at 473.

United States v. Tager, supra, correctly highlighted the hazards of allowing the government to ignore the strictures of Federal Rule of Criminal Procedure 6(e). It recognized that permitting an ICPI special agent to participate in, coordinate and potentially direct a grand jury investigation involving alleged mail fraud and conspiracy involving the very insurance companies paying his salary -- the identical facts as are present in the instant case -- "could significantly

impair the independence and impartiality required of the grand jury in the performance of its functions."

On remand from the court of appeals, Judge Theis held:

> The Court notes that while this case concerns a violation of Rule 6(e), not 6(d), disclosure to a nonauthorized person lacking in impartiality may impair the fairness and independence of the grand jury as much as the presence of an unauthorized person in the grand jury room." (App. F, p. 48a-49a)

It is also apposite to note that in the Tager case the government agreed that the indictment had to be dismissed and in fact was dismissed.

Justice Frankfurter in a concurring opinion in Malinski v. People of the State of New York, 324 U.S. 401, 65 S.Ct. 781 (1945), stated:

> "The history of American freedom is, in no small measure, the history of procedure."

Petitioner's conviction based on an indictment secured in violation of historical grand jury procedure should be reversed.

CONCLUSION

It has been unquestionably established that an insurance company employee had access to, reviewed secret grand jury material and participated in the securing of evidence leading to the indictment of petitioner. The secrecy of the grand jury proceedings was violated. The only attempt at legitimacy by the government was to have that individual appointed an agent of a grand jury, which is a procedure not countenanced by the Rules of Criminal Procedure or the decisional law. The grand jury which improperly appointed

Saccani as an agent expired without indicting anyone in the Pittsburgh area.

This Court has recently reaffirmed the importance of the inviolability of the secrecy of grand jury matters from a constitutional standpoint as well as history of the procedure relating to grand jury secrecy. The petitioner is entitled under the Fifth Amendment to an impartial and independent grand jury. The uncontroverted evidence in the court below was that this right was violated. Where this Court has held that civil Justice Department attorneys, attorneys general of the various states and other government employees not covered by Rule 6(e) cannot be given grand jury protected evidence without application to the court and a showing

of particularized need, this case stands for the proposition that an assistant United States attorney may make an employee of private industry privy to matters occurring before the grand jury without the petitioner having a right to redress that wrong. The grand jury which indicted this petitioner was compromised by the disclosure.

The Tenth Circuit has recognized that a grand jury is compromised and an indictment faulty when it is handed down by a grand jury whose secrecy has been violated by disclosure of matters occurring to a co-employee of the very agency employing the individual to whom disclosures were made in this case. The Third Circuit has ignored United States v. Tager, supra, and has decided contrary to the recent pronouncements

of this Court in protecting the secrecy of the grand jury.

The civilian employee could not distinguish between his private industry duties and his duties as a purported agent of the grand jury, for they were identical. The right of witnesses before grand juries, the constitutionally mandated and historically established function of the grand jury and the public confidence in the grand jury process are destroyed by allowing this flagrant violation to stand unchallenged.

Justice Brandeis cautioned in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928), that

> If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that

> in administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

A pernicious doctrine has been affirmed in the Third Circuit -- that a breach of grand jury secrecy fully documented by testimony and physical evidence when called to the attention of the court will not result in a correction of the breach of due process and violation of the Fifth Amendment as well as the Rules of Criminal Procedure. The Tenth Circuit has responded with action required by the seriousness of the violation. The Third Circuit should be required to do no less.

Respectfully submitted,

GONDELMAN BAXTER McVERRY
SMITH YATCH & TRIMM

Harold Gondelman

Attorneys for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5726

UNITED STATES OF AMERICA

vs.

ROBERT A. LEBOVITZ,
Appellant

(Criminal No. 80-148 - W.D. Pa. - Pittsburgh)

DISTRICT JUDGE: HONORABLE RABE F. MARSH

Submitted Under Third Circuit Rule 12(6)
June 6, 1983

BEFORE: SEITZ, Chief Judge, SLOVITER, Circuit Judge, and POLLAK, District Judge.*

JUDGMENT ORDER

After consideration of the contention raised by appellant, to-wit, that a conviction should be set aside and an indictment dismissed where a non-government employee of a private organization representing the interests of the alleged victims of the matters

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under investigation receives repeated and continued disclosures of matters occurring before the grand jury and acts in a position parallel to and as the alter ego of a government postal inspector in conducting, participating and directing the grand jury investigation, thereby jeopardizing the historical impartiality and independence of the grand jury guaranteed by the Fifth Amendment to the Constitution of the United States and by Rule 6(e)(2) of the Federal Rules of Criminal Procedure, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/ Seitz
Chief Judge

ATTEST:
/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: Jun- 7 1983

Appendix A

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* Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5726

UNITED STATES OF AMERICA

V.

ROBERT A. LEBOVITZ,

Appellant

(Criminal No. 80-148 - W.D. of Pa. - Pittsburgh)

SUR PETITION FOR REHEARING

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Hubter, Garth, Higginbotham, Sloviter, Becker, Circuit Judges, and Pollak, District Judge. *

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who

concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Seitz
Chief Judge

Dated: Jul 19 1983

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* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix C

IN THE UNITED STATES OF AMERICA
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CR. No. 80-148
	)	
ROBERT A. LEBOVITZ	)	SEALED

MEMORANDUM

A grand jury impaneled on July 31, 1979 returned an indictment on September 19, 1980 charging Robert A. Lebovitz with thirteen counts of mail fraud in violation of 18 U.S.C. § 1341 and one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. The indictment alleged the conspiracy between Attorney Lebovitz and doctors to defraud insurance companies.

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At the trial the government evidence disclosed that Lebovitz and another lawyer in his firm, Louis Kwall, conspired with Dr. Jack Pincus to submit inflated medical bills to insurance companies in connection with claims made on behalf of Lebovitz's clients for compensation for personal injuries caused by motor vehicles which included payment of their medical expenses.

On January 28, 1981, the jury found Lebovitz guilty of all fourteen counts in the indictment. The witnesses and abundant evidence produced by the prosecution proved that Lebovitz was guilty beyond a reasonable doubt. He was sentenced on March 5, 1981. The conviction was affirmed by the Court of Appeals[1/] and on April 19, 1982, certiorari was denied by the Supreme Court.[2/]

On May 3, 1982, the defendant moved to dismiss the indictment on the grounds of "breaches of grand jury secrecy and flagrant

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1. United States v. Lebovitz, 669 F.2d 894 (3rd Cir. 1982).

2. 102 S.Ct. 1979 (1982).

and persistent prosecutorial abuses and misconduct occurring during the course of this investigation, which, under the totality of the circumstances, so tainted the grand jury proceedings and the resulting indictment as to require dismissal."

The defendant also moved for a "new trial and other appropriate relief and sanctions, as a result of violations of his Fifth Amendment rights, a violation of the Federal Rule of Criminal Procedure 6(e), and under this Court's supervisory power." 3/

In our opinion, the motion for new trial should be denied. None of the defendant's Fifth Amendment rights were violated. We find

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3. The motion contains 47 pages of which the first 10 pages set forth the motion and the following 36 pages set forth an "Appendix."

The first 10 pages of the "Appendix" consist of "Findings and Opinion" of Chief Judge Weber in the case of United States v. David Litman, Esquire and Irving M. Portnoy, Esquire, Criminal No. 81-16, which prosecution

no violation of Federal Rule of Criminal Procedure 6(e0(2), General Rule of Secrecy, and no one is subject to punishment by contempt. Dismissal of the indictment was not a punishment specified by Rule 6(e)(2) for violation of

3. (continued)

is one of a number of prosecutions of lawyers and doctors who allegedly produced false and inflated personal injury charges in cases defended by insurance companies who insured persons injured in accidents.

The next 14 pages contain the testimony of Daniel Saccani in the Litman case.

The next 3 pages contain the testimony of Robert J. Cindrich in the Litman case.

The next 5 pages contain the testimony of Russell Siano in the Litman case.

Attached is a copy of a letter dated November 14, 1980 written by Robert J. Cindrich, the then United States Attorney in this district to Kevin D. Rooney, an Assistant Attorney General.

Attached is a copy of a letter dated April 2, 1980, written by Daniel Saccani, Special Agent to John Mackin, Regional Manager of the Insurance Crime Prevention Institute (ICPI). Movant's Exhibit 12 in the Litman case.

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the General Rule of Secrecy. 4/

The following facts are stipulated by the parties.

1. Prior to January 14, 1980, Daniel B. Saccani was given access from time to time to personal injury claim files in the possession of the Postal Inspection Service which files were obtained from the law firm of Lebovitz, Lebovitz and Smith, P.A. through execution of a search warrant by U.S. Postal Inspectors on July 26, 1979.

4/ Rule 6(e)(2) General Rule of Secrecy:

"A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court." (Emphasis supplied).

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2. Prior to January 14, 1980, Daniel B. Saccani was given access from time to time to records in the possession of the Postal Inspection Service of physicians which records were either obtained by execution of a search warrant on the office of the physician or which were voluntarily surrendered to the United States Postal Inspection Service by the physician.

3. Documents obtained as set forth in paragraphs 1 and 2 of this stipulation were shown to witnesses identified below who testified before a federal grand jury prior to January 14, 1980 to the extent the transcripts

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4. (continued)

Rule 6(e)3(A)(ii) provides as follows:

"(3) Exceptions.

"(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to --

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law."

of said testimony so reflect. [5] Thereafter documents were returned to files from which they were taken.

NAME	DATE OF TESTIMONY
Ruth Meyer	August 1, 1979
Joan Posa	August 1, 1979
David Nejack	November 13, 1979
Martha Sanchesen	November 13, 1979
Walter Sanchesen	November 13, 1979
Sharon Campbell	November 13, 1979
Pamela Smilack	November 13, 1979
Sheldon Smilack	November 13, 1979
Paul Joseph Decker	November 13, 1979
Robert Anthony Halbleib	November 13, 1979

4. Documents shown to Joan Posa and Ruth Meyer during their testimony before the grand jury on August 1, 1979 were identified and marked as grand jury exhibits.

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5. No transcripts of the grand jury testimony have been ordered by the court, or ordered to be disclosed to anyone.

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5. Documents shown to David Nejack, Martha Sanchesen, Walter Sanchesen, Sharon Campbell, Pamela Smilack, Sheldon Smilack, Paul Joseph Decker and Robert Anthony Halbleib were identified in the record (transcript) of testimony before the grand jury but were not marked as grand jury exhibits.

6. After documents were shown to the said witnesses before the grand jury, the documents were returned to the files from which they were taken.

7. Between August 1, 1979 and January 14, 1980 Daniel B. Saccani used files containing grand jury exhibits in the possession of the Postal Service which had been obtained through searches and by voluntary surrender (as stated in paragraphs 1 and 2 hereof) to the extent testimony of Saccani and Postal Inspector Robert Morgan on May 13, June 1 AND June 2, 1982, and exhibits reflect such use.

8. Postal Inspector Morgan appeared before the grand jury on September 19, 1980 and

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utilized a chart (Exhibit "J" prepared by him in his testimony.

We find additional facts as follows:

9. The insurance Crime Prevention Institute (ICPI), a non-profit corporation, was organized by the casualty insurance industry to investigate and detect fraud against insurance companies. 6/

10. Since 1977, Daniel Saccani was an employee of ICPI assigned to the Pittsburgh area. The postal inspectors requested Saccani to help them in the investigation of a number of lawyers and doctors including Robert A. Lebovitz and his law firm by serving as a

6. The ICPI was established in 1971, when it appeared that insurance fraud had compounded into tremendous proportions, and, inter alia, involved professional people breaking their ethical obligations as well as the criminal law. Its role as a deterrent has become increasingly important. ICPI is presently supported by 400 member companies.

liaison between the postal inspectors and the affected insurance companies. He was asked to locate and identify pertinent files in the possession of certain insurance companies, check names, assist the postal inspectors and government attorneys in interviewing witnesses, and otherwise make his services available to the investigating postal inspectors and government attorneys.

11. In 1977, Daniel Saccani became aware through his relationship with the postal inspectors that there was a group of five law firms that were being investigated for possible mail fraud violations.

12. The case against Attorney Lebovitz developed out of the investigation of Dr. Pincus.

13. Throughout the investigation, Saccani maintained an investigative maintenance file numbered NP 73135 (Defendant's Exhibit B) showing all of his activities in the investigation of the cases surrounding the various lawyers and doctors under investigation.

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14. Saccani also kept a running report (Form 7) on the course of the various investigations he was involved in. A copy of these forms was sent monthly to ICPI headquarters; a copy was sent to the regional office and Saccani retained his agent's copy.

15. On June 20, 1979, Saccani began preliminary investigations of the law firm of Lebovitz, Lebovitz and Kwall, reviewing index reports and investigative notes.

16. Most of the information that Saccani obtained concerning the Lebovitz investigation was obtained from Dr. Pincus in the form of patient charts and patient bills and correspondence from Robert A. Lebovitz to Dr. Pincus which Dr. Pincus made voluntarily available to the postal inspectors. Furthermore, Saccani visited Dr. Pincus at his office where this information was discussed and his notes were turned over to Postal Inspector Siano.

17. Again on June 15, 1980, Saccani met with Postal Inspector Siano at Dr. Pincus' office for another review session of prior

statements, and at this time Dr. Pincus turned over patient files to Postal Inspector Siano.

18. Saccani accompanied Postal Inspector Morgan on several interviews of individual patients of Dr. Pincus in relation to the Lebovitz case.

19. Saccani saw memoranda of interviews of witnesses prepared before they appeared before the grand jury. He conducted certain interviews of witnesses before they appeared before the grand jury.

20. Saccani participated in the service of subpoenas to obtain various insurance company files at the direction of the postal inspectors. He saw the contents of these files after they were subpoenaed. He also assisted in serving subpoenas on certain witnesses.

21. As a representative of ICPI Saccani was permitted to obtain, inspect and review the claim files of certain insurance companies, non-members of ICPI, without the necessity for the government to obtain subpoenas.

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22. Saccani assisted Postal Inspector Morgan in preparing materials to be incorporated in a "letter of presentation." He assisted in gathering documents which were mailed, memoranda of interviews, patient charts, doctor bills, and correspondence between Lebovitz and Dr. Pincus.

23. Saccani assisted Assistant United States Attorney Curry and Postal Inspector Morgan in preparing lists of persons to be subpoenaed from the insurance companies, identifying claimants, the insured persons, the dates of the motor vehicle accidents, and the claim file numbers.

24. Saccani further assisted Attorney Curry when subpoenaed witnesses were to be brought into his office prior to going into the grand jury room by reviewing their prior memoranda of interview, demeanor, and what Curry could expect from them.

25. Saccani took an active part in helping postal inspectors find and identify documents; and he discussed witnesses and documents with Attorney Curry.

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26. Saccani reviewed with several individuals their previously given statements before they went into the grand jury room to give their testimony.

27. Saccani was present with Postal Inspectors Siano and Morgan and Attorney Curry at interviews with witnesses before they went into the grand jury room, and said witnesses were read their prior memoranda of interview and asked if they agreed with those prior statements.

28. Saccani was a valuable aid in the Lebovitz investigation and other investigations conducted by the postal inspectors and the United States Attorneys.

29. Saccani was never present in the room occupied by the Lebovitz grand jury as a witness or otherwise.

30. Saccani did not at any time read a transcript of any grand jury testimony in the Lebovitz case.

31. Saccani did not at any time read any summary of a witnesses' grand jury testimony.

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32. Saccani did not disclose to any person other than the postal inspectors and the United States Attorneys involved, any matters which were expected to occur before the grand jury. He did not reveal to anyone other than the aforesaid federal officers, the identity of persons who would be called to testify before the grand jury, the content of their testimony, nor did he reveal to anyone when the grand jury would return an indictment.

33. Saccani did not present any information in this case to the grand jury; nor did he participate in any decision with respect to which claims would be included in an indictment. Saccani did not participate in any decisions with respect to which documents would be subpoenaed for the grand jury; nor any decision as to which or when witnesses would be called to testify; nor whether an indictment would be presented to the grand jury.

34. In the Litman case, Saccani was made an agent of the grand jury. He was not made an agent of the grand jury in the Lebovitz case.

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This factor adequately distinguishes his actions in the Lebovitz case from his actions in the Litman case.

35. As a result of investigations participated in by Saccani, successive grand juries returned indictments for mail fraud against several lawyers and doctors who have been convicted. The Litman case is in trial at this time.

CONCLUSIONS OF LAW

We do not find any violation of Federal Rule of Criminal Procedure 6(e) committed by Daniel Saccani nor by Postal Inspectors Morgan and Siano, nor by Assistant United States Attorney Curry or any other United States Attorney concerned with the Lebovitz case which would warrant a contempt citation.

The ICPI did not instigate the grand jury investigation of the Lebovitz law firm or of Robert A. Lebovitz.

Daniel Saccani, an agent of ICPI, did not coordinate and potentially direct the Lebovitz grand jury investigation.

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There was no prosecutorial misconduct by committing breaches of grand jury secrecy.

The defendant, Robert A. Lebovitz, was indicted by an impartial and unbiased grand jury.

Information obtained by Daniel Saccani from sources independent of the grand jury proceedings does not violate Rule 6(e).

Access to documents which later were marked as grand jury exhibits and submitted to the grand jury did not constitute disclosure of matters occurring before the grand jury. Cf. United States v. Stanford, 589 F.2d 285 at 291 (7th Cir. 1978), cert. den. 440 U.S. 983 (1979).

The documents and files obtained and observed by Saccani did not reveal the essence of what took place in the grand jury room or anything about the grand jury investigation. Cf. In Re Grand Jury Investigation, 630 F.2d 996, 1000 (3d Cir. 1980).

Service of subpoenas ad testificandum and subpoenas duces tecum by Saccani did not constitute a violation of Rule 6(e).

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There was no direct disclosure of the actual testimony of any witness appearing before the grand jury. No unauthorized person entered the grand jury room during the presentation of testimony.

There is no support in the record that witnesses subpoenaed before the grand jury were improperly influenced by prosecutorial misconduct, or by Daniel Saccani, or by the postal inspectors involved, i.e., Morgan and Siano.

The defendant, Lebovitz, made no showing of how any activity of Saccani, the postal inspectors or the government attorneys prejudiced him before the grand jury which would justify dismissal of the indictment.

The defendant, Lebovitz, has not demonstrated any prejudice whatsoever to him in his trial by Saccani, the postal inspectors or the government attorneys which would justify dismissal of the indictment.

Appendix C

DISCUSSION

A.

To dismiss the Lebovitz indictment in the absence of any showing of prejudice in a fair trial and grand jury proceedings would constitute a "punishment of society." United States v. Stanford, 589 F.2d 285, 299 (7th Cir. 1978), cert. den. 440 U.S. 983 (1979).

Rule 6(e) of the Federal Rules of Criminal Procedure provides that "matters occurring before the grand jury" must be shielded from disclosure.

As the Seventh Circuit Court of Appeals has said in In Re September 1971 Grand Jury, 454 F.2d 580, 583 (7th Cir. 1971):

> ". . . '(G)rand jury secrecy' is no magical incantation making everything connected with the grand jury's investigation somehow untouchable." (Citations omitted.)

In Stanford, supra, the court held that not all documents submitted to a federal grand jury are within the special protection of the rule. At page 291 it is stated:

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"The restrictions of Rule 6(e) apply only to 'disclosure of matters occurring before the grand jury.' Unless information reveals something about the grand jury proceedings, secrecy is unnecessary.

". . . Unlike testimony, documents are created for purposes other than the grand jury investigation; they are therefore more likely to be useful for purposes other than revealing what occurred before the grand jury. See Illinois v. Sarbaugh, 552 F.2d 768, 772 n.2 (7th Cir.), cert. den., 434 U.S. 889 (1977). Persons may have a legitimate interest in documents so that disclosure to them does not constitute disclosure of matters occurring before the grand jury." (Footnote omitted; citations omitted.)

In United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960) it is stated:

". . . Thus, when testimony or data is sought for its own sake -- for its intrinsic value in furtherance of a lawful investigation -- rather than to learn what took place before the grand jury, it is not a valid defense to disclosure . . . that the same documents had been, or were presently being, examined by a grand jury . . .:

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In addition to Interstate Dress Carriers, other cases have held that documents subpoenaed before the grand jury sought for their own "intrinsic value" and not to discover what has happened in grand jury proceedings are not protected by the secrecy provisions of Rule 6(e). Capitol Indem. Corp. v. First Minn. Const. Co., 405 F.Supp. 929 (D. Mass. 1975); United States v. Saks & Co., 426 F. Supp. 812 (S.D.N.Y. 1976); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972); 50 ALR Fed 675, 681-683, § 3[b] (1980).

The Court of Appeals for the Third Circuit adopted the tests in Stanford and Interstate Dress Carriers. See In Re Grand Jury Investigation, 630 F.2d 996 (3d Cir. 1980). The court stated at page 1000:

> ". . . [T]he policy of secrecy is not absolute. United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983, 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979). Rule 6(e) shields solely 'matters occurring before the grand jury.' It is designed to protect from disclosure only the essence of what takes

place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process. . . . The mere fact that a particular document is reviewed by a grand jury does not convert it into a 'matter occurring before the grand jury' within the meaning of 6(e). . . ." (Citations omitted.)

B.

The defendant relies upon United States v. Tager, 506 F.Supp. 707 (D. Kansas 1979). In that case grand jury materials and transcripts of testimony of witnesses in the grand jury proceedings were disclosed to Mr. Ed House, an ICPI agent. House also delivered documents to the grand jury room. We do not believe the Tager case is on point.

In the Lebovitz case, Saccani did not see any transcripts of testimony of witnesses who testified before the grand jury, and Saccani never entered the grand jury room.

In addition, the defendant argues, citing Tager, that Saccani, being an agent of the insurance companies, the victims of the Lebovitz crimes, is sufficient per se to

dismiss the indictment returned against him. We disagree.

Defrauded insurance companies have records of relevant documents, employees and former claimants. It was necessary that an agent correlate the document files and witnesses in order that the government attorneys could present them to the grand juries.

> ". . . Dismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way, as where perjured testimony has knowingly been presented. . . ." United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978). [7]

There is nothing shocking to the conscience in the circumstances of the grand jury indictment of the defendant, Lebovitz, nor any showing of prejudice at his trial.

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7. See also: United States v. Kennedy, 564 F.2d 1329, 1335-1336 (9th Cir. 1977) citing Costello v. United States, 350 U.S. 359, 363-364 (1956); Holt v. United States, 218 U.S. 245 (1910)

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The defendant's argument that the participation of the victims' agent in a grand jury investigation should authorize a per se dismissal of the indictment is refuted by Judge Van Dusen's statement in United States v. Birdman, 602 F.2d 547, 558 (3d Cir. 1979):

> "However, to attempt to serve a public interest in the purity of the grand jury proceeding, by the per se sanction of dismissing indictments, is to disserve another public interest by frustrating prosecutions of criminals. . . ."

As heretofore indicated the punishment specified for violation of Rule 6(e) is "contempt," not per se dismissal of the indictment.

No postal inspector or government attorney participating in the grand jury investigation of Lebovitz was guilty of contempt.

It is important that the defendant demonstrate a real possibility of harm before the court takes the drastic step of dismissing the indictment because of disclosure of

prepared material prior to the grand jury proceedings. The veil of secrecy covers the grand jury proceedings themselves, -- not the subject matter of the investigation or statements made by persons before grand jury testimony is given.

C.

In United States v. Morrison, 449 U.S. 361 (1981) at page 365, it is stated: "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." (Footnote omitted.)

In United States v. Owen, 580 F.2d 365, 367-368 (9th Cir. 1978), it is stated:

> ". . . [S]ome courts have suggested that the exercise of a court's supervisory powers is not contingent on a showing of prejudice. For example, the D.C. Circuit recently stated that "serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment . . ., without regard to prejudice to the accused.' United States v. McCord, 166 U.S. App.D.C. 1, 16, 509 F.2d 334, 349 (1974), cert.

den., 421 U.S. 930, 95 S.Ct. 1656, 44 L.Ed.2d 87 (1975). . . . However, under the better view, which we adopt, other courts have demanded that there be some prejudice to the accused by virtue of the alleged acts of misconduct. An example of this position is United States v. Acosta, 526 F.2d 670, 674 (5th Cir.), cert. den., 426 U.S. 920, 96 S.Ct. 2625, 49 L.Ed.2d 373 (1976), a case reversing a district court's misconduct and stating:

> 'Defendants are entitled to take advantage of any error which prejudices their case but they are not entitled to a reward for such conduct unless it could have had at least some impact on the verdict and thus redounded to their prejudice.' (Emphasis supplied.) (Citations omitted.)

"Even in the face of a 'no prejudice' rule, a dismissal would not be required. As McCord states, a reversal may be appropriate where misconduct 'pollutes' a prosecution. Here, there was no such effect on the proceedings. . . ." (Emphasis supplied.)

There was no proof of disclosure of grand jury secrecy and no showing of prejudice to the defendant.

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An appropriate order will be entered denying the defendant's motions.

DATED: November 17th, 1982.

/s/ Rabe F. Marsh
RABE F. MARSH
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. No. 80-148
	)	
ROBERT A. LEBOVITZ	)	SEALED

ORDER OF COURT

AND NOW, this 17th day of November, 1982, after hearing and due consideration of the briefs of the defendant and the government, IT IS ORDERED, ADJUDGED AND DECREED that the defendant's motion to dismiss the indictment returned by the grand jury on September 19, 1980, be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant's motion for a new trial and "other appropriate relief and sanctions" be and the same is hereby denied.

IT IS FURTHER ORDERED that the defendant, Robert A. Lebovitz, report to the United States Marshal, 810 United States Courthouse, Seventh and Grant Streets, Pittsburgh, Pennsylvania, on Tuesday, November 30, 1982, at 10:00 a.m., to

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commence service of the sentence of imprisonment imposed by this court on March 5, 1981.

IT IS FURTHER ORDERED that this order and the accompanying opinion issued this date be sealed pending the conclusion of the trial in United States v. Litman, Criminal No. 81-16, now pending before another member of this court.

/s/ Rabe F. Marsh
RABE F. MARSH
UNITED STATES DISTRICT JUDGE

United States v Litman, et al.

Mail Fraud—Conspiracy—Motion For Judgment of Acquittal.

The court grants a motion for judgment of acquittal by each defendant at the close of the government's case in a criminal action against two lawyers charged with mail fraud and conspiracy arising out of an alleged scheme to inflate medical bills in personal injury cases, because viewing the evidence in the light most favorable to the government, any reasonably-minded jury necessarily would have a reasonable doubt as to guilt. In particular, the government failed to prove that either of the laywers knew that physicians had inflated the bills in question, and under the evidence, the conspiracy charged in the indictment could not have existed. *(Robert L. Byer)*

David M. Curry and *William F. Ward*, Assistant U.S. Attorneys, for the Government.

David J. Armstrong, Ingrid M. Lundberg, Daniel H. Shapira and *Robert L. Potter* for S. David Litman.

Harold Gondelman and *Francis C. Rapp, Jr.* for Irving M. Portnoy.

Criminal No. 81-16. In the U.S. District Court for the Western District of Pennsylvania.

BENCH OPINION

COHILL, D.J., December 1, 1982—Chiseled on a facade of the Department of Justice Building in Washington, D.C. is this statement: "The United States wins its case whenever justice is done one of its citizens in the Courts." It is my opinion that if I were to permit this trial to go on, a great injustice would be done to two citizens—Mr. Litman and Mr. Portnoy.

We have before us motions for judgment of acquittal for each defendant. These motions will be granted. In considering a motion for judgment of acquittal at the close of the government's case, the trial judge must decide whether, viewing the evidence in a light more favorable to the government, any reasonably-minded jury considering that evidence would necessarily have a reasonable doubt as to guilt. In circumstantial evidence cases, which this certainly is, the inferences reasonably to be drawn from the evidence must not only be consistent with guilt but must also be *inconsistent* with every reasonable hypothesis of innocence. United States v Marable, 574 F.2d 224 (5th Cir. 1978). See also: Curley v United States, 160 F.2d 229 (D.C. Cir.) cert. den. 331 U.S. 837 (1947). A trial judge should not permit a case to go to the jury if the evidence is so scant that the jury could only speculate or conjecture as to the defendants' guilt. United States v Lonsdale, 577 F.2d 923 (5th Cir. 1978).

1. Mr. Litman

In following those precepts let us first consider the government's case against Mr. Litman. The government established that he began his law practice in the early 1950's. He handled some personal injury cases, plus other types of cases as well.

In Count 1 of the indictment, the conspiracy count, he is charged with conspiring with Irving M. Portnoy "and with others known to the grand jury" to defraud insurance companies by obtaining false and inflated medical reports from physicians to support personal injury claims of clients of his law firm. The remaining 18 counts of the indictment charge him and Mr. Portnoy with using the mails to defraud, naming 7 clients in 17 of those counts and 5 clients in the one other count.

The government has chosen a most difficult path in attempting to bring about the convictions of these defendants. All of the government's evidence against Mr. Litman

was circumstantial, and, indeed, the testimony of all three doctors tended to exonerate him.

This case began on October 12 with jury selection. Testimony commenced on October 15. We have now had seven weeks of trial, heard 34 witnesses (I refused to allow the testimony of another witness, Mr. Henstock), including three doctors, two of which admitted submitting false and inflated bills to the law firm but denied having any arrangement or agreement with Mr. Litman. We also heard testimony from 24 patient-clients, each of whom denied knowledge that the doctor bills, when submitted to the lawyer in his or her case, were inflated. When asked, each patient-client specifically denied conspiring with any doctor or lawyer to obtain false and inflated bills.

Each of the three doctors clearly and unequivocally denied conspiring or agreeing with Mr. Litman to submit false and inflated bills. Indeed, the testimony was that since the mid-1950's Mr. Litman had not even handled personal injury cases, although once he attended a mass conciliation before Judge Silvestri when another member of the firm could not go, and on rare occasions he conducted the initial interview of a client.

According to Dr. Meyer A. Rosenbloom, who is married to a cousin of Mr. Litman, Dr. Rosenbloom, in the late 1940's, began inflating bills for some of his patients who were not represented by lawyers and who had complained to him that they were not getting big enough settlements in dealing with insurance companies. He even mentioned one instance in which he stated that an insurance adjuster had suggested to a patient that the patient get a larger doctor bill so that he could get a bigger settlement.

We found much of Dr. Rosenbloom's testimony to be confusing, confused, at times inconsistent and questionable because of the passage of time. He was testifying to events which occurred over thirty years ago. However, taking Dr. Rosenbloom's testimony most strongly in favor of the government, and giving that testimony all inferences favorable to the government, we recall that Dr. Rosenbloom testified that he began treating clients of Mr. Litman in the early 1950's when Mr. Litman began to practice law, a practice which included personal injury cases. For awhile the Rosenbloom bills were truthful and accurate. At some point a client complained to Mr. Litman that he had visited the doctor more often than the bill indicated. Mr. Litman and Dr. Rosenbloom spoke, and the doctor revised the bill to reflect the number of visits the patient claimed to have made. On another occasion a client complained to Mr. Litman that Dr. Rosenbloom was not giving him adequate care, and Mr. Litman called Dr. Rosenbloom and asked him to provide more treatment for that patient.

Dr. Rosenbloom admitted inflating bills for a lawyer in the 1940's. The lawyer is now deceased and was not in the Litman firm. He specifically denied having any agreement or arrangement with Mr. Litman to inflate bills.

The government spent a great deal of time proving discrepancies between day books of Dr. Rosenbloom, his patient charts and his bills. The day books were supposed to contain the names of each patient, the date he came to the office and what, if anything, he paid (this was kept in code). The charts, many of which had admittedly been destroyed by Dr. Rosenbloom to obstruct the investigation of Dr. Rosenbloom by postal authorities, were cards on which the doctor or other office personnel would note what treatment the patient received. The bills supposedly reflected individual office visits. We have no doubt that Dr. Rosenbloom submitted false bills, but the day books, as shown during the cross-examination by the defendant's lawyers, as a piece of evidence, were completely inaccurate, and whether this was by accident or malice, would have been useless to prove anything in the hands of the jury.

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Dr. Rosenbloom testified that Mr. Litman never suggested any figure for a medical bill and never requested a medical bill in any particular amount. Later, in the 50's, Mr. Litman stopped handling personal injury cases except as previously noted, and he had no further contacts with Dr. Rosenbloom concerning such cases.

Dr. Pincus denied ever even having a case with Mr. Litman, and Dr. Dobrowolsky, whose testimony was expunged, did not even admit to participating personally in inflating bills, although he admitted that inflated bills had gone out of his office.

The personal injury cases on which the government based its charges are extremely old—some dating back to 1970. Many of the witnesses were interviewed by postal inspectors between 1978 and 1980, and testified before the grand jury in 1981. It was obvious during the trial that their memories had faded; much of the testimony came from memories resurrected from what they saw on often incomplete and sketchy files of both the law firm and the doctors. To ask the jury to ignore or guess what might be missing from those files would be one form of speculation.

The witnesses understandably had virtually no independent recollection of the actual events except, perhaps, the traumatic events of an auto accident itself; most of these cases involved auto accidents. They were interviewed by postal inspectors with the help of files and letters as much as 10 years after the event. The government would then go over the memoranda of these interviews with the witnesses shortly before their appearance at the grand jury and again a day or two before they testified at the trial. In one case, Rupinski, the twelfth anniversary of the accident, November 3, 1970, ironically fell during this trial.

Conspicuous by their absence were any lawyer-witnesses. The government, through the testimony of its witnesses, brought up the names of at least six lawyers who had some role in handling one or more of these cases. Some of those lawyers are still with the firm; others are not. For reasons best-known only to the government, none of those lawyers were called to testify.

Each of the three doctors specifically exonerated Mr. Litman. The government apparently believes that because he was the senior partner in the firm this criminal activity of the doctors somehow rubbed off on him.

While the precepts of the liability of a master for his servant's conduct are well-established in the civil law, those same principles do not apply in criminal cases. The evidence was sketchy as to exactly what Mr. Litman's position was in the firm, but we are willing to assume, for purposes of this discussion, that he was the senior and managing partner.

At argument on these motions, the government contended that the evidence indicated that Mr. Litman started the scheme sometime in the 1950's, never divorced himself from it and is therefore responsible for the acts of Mr. Portnoy, an alleged co-conspirator. The fact that Mr. Litman initialed settlement sheets or signed checks does not prove knowledge or conspiracy. The reasons for the initialing of the checks and settlement sheets were never established and it would be mere speculation, at this point, to try and determine the meaning of this conduct.

Mr. Litman obviously could not have had a conspiracy with Mr. Portnoy, his alleged co-conspirator, in the early 1950's, since Mr. Portnoy was a child at that time. He did not join the Litman firm until 1968.

Vicarious liability is especially inappropriate in a crime such as conspiracy where one of the elements of the crime is specific intent. To prove a conspiracy, the evidence

must establish that the conspiracy was *knowingly* formed and that the defendant *wilfully* participated in the unlawful plan, *with the intent* to advance some object of the conspiracy. Mere knowledge or approval of or acquiescence in the object of the conspiracy without any agreement to cooperate is not enough to constitute membership in the conspiracy. Jones v United States, 365 F.2d 87 (10th Cir. 1966). A defendant cannot be found guilty merely by association. Furthermore, any contacts with alleged co-conspirators are presumed innocent unless circumstances prove otherwise. United States v Kompinski, 373 F.2d 429 (2d Cir. 1967).

The indictment alleged that they had conspired "with others known to the grand jury." The government, although asked by the defendants, refused to name those unnamed co-conspirators. If this case were to continue, we might require the government to name those individuals, but in view of the posture of this case, the request by the defendants for those names is academic.

As noted, the government had a heavy burden; its task was to establish that Mr. Litman wilfully and knowingly devised and initiated a conspiracy to defraud. We are convinced that the government has failed even to prove, by circumstantial evidence, or otherwise, that Mr. Litman had any knowledge that the bills in question were inflated.

Pursuant to Fed. R. Crim. P. 29, the motion of S. David Litman for Judgment of Acquittal is hereby granted, and the Clerk of this Court is directed to enter a judgment of acquittal in favor of the defendant, S. David Litman.

2. Mr. Portnoy

While Dr. Rosenbloom completely exonerated Mr. Litman, he asserted that he did prepare false and inflated bills in the presence of, and with the cooperation of Irving Portnoy on one occasion—a meeting in his apartment of September 2, 1975. His testimony tended to be vague and confusing relative to that meeting; he could only specifically remember inflating two bills—those of Merial and Talib Shabazz—in conjunction with Mr. Portnoy. Mrs. Shabazz testified as to her injuries and the handling of the case by the law firm, but for some inexplicable reason, Mr. Shabazz, who was also present in the courtroom, was not called by the government. We have an affidavit filed by Mr. Gondelman that Mr. Shabazz told his investigator that he had been in prison when interviewed by postal inspectors, that they pressured him into giving statements in exchange for an offer to secure an early release for him from prison and that certain statements he made were not true.

We are at a loss to understand why the government did not call Mr. Shabazz and therefore infer that his testimony would have been favorable to Mr. Portnoy. In Graves v United States, 150 U.S. 118, 121 (1983) the Court said:

> . . . if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction the fact that he does not do it creates the presumption that the testimony, if produced would be unfavorable.

This principle has since been modified to raise an inference rather than a presumption. United States v Blakemore, 489 F.2d 193, 195 (6th Cir. 1973).

Another government witness, Rosemary Gianni, a knowledgable and experienced paralegal at the Litman, Litman Harris & Specter firm, testified that she, too, had been present at the Rosenbloom-Portnoy meeting, witnessed and heard all that had transpired and did not believe that anything illicit or illegal had occurred.

The discrepancy in the testimony of Dr. Rosenbloom and Mrs. Gianni, even though they both were government witnesses, might, of itself, present a jury question but there is a strong legal reason why this question will not be presented to the jury.

Paragraph 4 of Count 1 of the Indictment states in part: "During the period from on or about 1950 to on or about October 22, 1979 . . . defendant, S. David Litman did wilfully and knowingly conspire, combine, confederate and agree with defendant Irving M. Portnoy . . . to defraud . . . We will take judicial notice of the fact that Mr. Portnoy is a much younger man than Mr. Litman; indeed, he was not admitted to the bar until 1967, some seventeen years after the beginning of the alleged conspiracy.

Paragraph 5 asserts that Mr. Litman *initiated* the scheme of obtaining false and inflated medical reports. If Mr. Litman initiated the scheme in the 1950's, the scheme would have been some seventeen years old before Mr. Portnoy could have joined it.

We have ruled that Mr. Litman is not guilty of anything, including initiating the alleged scheme. The government has given no clue as to what "others" the grand jury might have had in mind as co-conspirators. On the basis of the evidence before us, therefore, no scheme existed, for Mr. Portnoy to join. Thus, even if the testimony of Dr. Rosenbloom is taken as absolutely true, that while he did not remember inflating any other specific bills, he did remember inflating the bill of Mr. and Mrs. Shabazz, and that Mr. Portnoy participated, the conspiracy described in the indictment did not exist. We consider this to be a fatal variance between the allegata and probata.

Rule 52(a) of the Fed. Rules of Criminal Procedure provides that any "variance which does not affect substantial rights shall be disregarded." The Third Circuit has held that there are two situations in which a variance shall *not* be disregarded.

In United States v. Somers, 496 F.2d 723 (3d Cir. 1974), cert. denied, 419 U.S. 832 (1974), the Court held that a variance is fatal if it is a "modification in the elements of the crime charged." If the variance does not alter the elements of the offense, the variance will still be fatal if the substantial rights of the defendant have been affected.

The Supreme Court has defined when a defendant's substantial rights are affected. In Berger v. United States, 295 U.S. 78 (1934), the Court held that a variance prejudices defendant's substantial rights if 1) the indictment does not sufficiently inform the defendant of the charges against him so that he may prepare a defense, and 2) if the variance presents a danger of a second prosecution for the same offense.

In this case, the variance cannot be disregarded since it alters the elements of the offense and since it subsequently affects Mr. Portnoy's rights.

Mr. Portnoy was charged with *joining* an existing conspiracy. This is what his defense of the conspiracy charge would have been based upon.

To require him at the close of the government's case to defend against *creating* or forming a new conspiracy would be inherently unfair.

As to the substantive counts, 2-19 in the indictment, the government introduced a mountain of paper exhibits, nearly all being taken from the law office or medical files of the client-patients. The exhibits clearly established that Dr. Pincus and Dr. Rosenbloom submitted fake and inflated medical bills to Mr. Portnoy and that Mr. Portnoy, in turn, submitted them to the insurance companies. Indeed Drs. Pincus and Rosenbloom admitted to preparing such bills. We will not bother to discuss the testimony of Dr. Dobrowolsky since we ordered it expunged, but he certainly said nothing to implicate Mr. Portnoy. Nothing in the testimony of Dr. Pincus implicated Mr. Portnoy either.

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Neither did testimony of Dr. Rosenbloom implicate Mr. Portnoy in the substantive counts.

The missing link is any evidence whatsoever of knowledge of Mr. Portnoy. The government seems to believe that evidence of an inflated bill coming in from a doctor to a lawyer establishes knowledge on the part of the lawyer that the bill is inflated. We would be pleasantly surprised at any busy lawyer who took the time to cross check the accuracy of every aspect of a legal file when he is in the process of negotiating a settlement. The fact that these medical reports and bills were usually late supports the conclusion that, because of the need for haste, the lawyers would be even less apt to check their accuracy. We must also note in passing that the insurance companies had an equal chance *and a much better reason* to check and cross check these bills and reports for accuracy than would the lawyer representing the claimant. In one instance an insurance company requested an itemized bill, but this is the closest any came to questioning one of these files.

Juries must not be permitted to speculate or convict on the basis of suspicion and innuendo. United States v Wieschenberg, 604 F.2d 326 (5th Cir. 1979).

I have carefully listened to this testimony and had the benefit of observing the witnesses for the government. I do not believe that the government has established the necessary link between the illegal acts of the doctors and the requisite knowledge on the part of Mr. Portnoy.

For these reasons, pursuant to Fed. R. Crim. P. 29, the motion of Irving M. Portnoy for Judgment of Acquittal is hereby granted, and the Clerk of Court is directed to enter a judgment of acquittal in favor of the defendant, Irving M. Portnoy.

During the trial we took a number of motions under advisement. In view of the judgments of acquittal just entered, it is now unnecessary to rule on any of these motions.

Thanks to the jury.

/s/ MAURICE B. COHILL, JR.
United States District Judge

United States v Lichtenstein

Criminal Procedure—Grand Jury Secrecy—Search and Seizure.

The court will suppress evidence obtained by a search warrant which was issued on the basis of an investigation by a private investigator to whom the government unlawfully disclosed grand jury information in violation of Fed.R.Crim.P. 6(e)(2). *(Robert L. Byer)*

David M. Curry, Assistant U.S. Attorney, for the United States.

Harold Gondelman and *Fred E. Baxter, Jr.* for defendant.

Criminal Action No. 80-78. In the U.S. District Court for the Western District of Pennsylvania.

MEMORANDUM

BARRON P. MCCUNE, D.J., December 27, 1982.—The defendant's Motion to Dismiss the indictments (originally one indictment) which we consider here, is based upon United States v Tager, 638 F.2d 167 (10th Cir. 1980). It is essentially a Motion to Reconsider Judge Weber's opinion at No. 81-16 in U.S. v S. David Litman and Irving M. Portnoy, dated March 16, 1981, because the same issue is presented here. Judge Cohill reconsidered the issue before the trial of Litman and Portnoy began, and reached the conclusion which Judge Weber had reached, that Tager did not control the issue.

Judge Weber's opinion traces, in detail, the activities of Daniel Saccani, an employee of the Insurance Crime Prevention Institute (ICPI), and whether those activities violated Rule 6(e)(2) of the Federal Rules of Criminal Procedure in the investigation referred to herein.

The record of the hearing before Judge Weber has been incorporated here and we will incorporate his opinion by reference. We will not repeat many of Judge Weber's findings or conclusions.

David L. Lichtenstein was indicted at No. 80-78 on April 18, 1980, along with Marion P. Parisi and Dr. Louis N. Napoleon. All were charged with criminal conspiracy in violation of 18 U.S.C. §371, and with mail fraud in violation of 18 U.S.C. §1341. The indictment contained six counts. The sixth count was severed for trial because it charged a separate conspiracy.[1]

The trial of the first five counts started on October 28, 1980, and resulted in a hung jury. In due course, a mistrial was ordered on November 17, 1980.

A motion to dismiss on Rule 6 grounds was not filed before trial because the identity of Mr. Saccani was not known until the indictment of Litman and Portnoy on February 3, 1981, or shortly thereafter. It had been assumed during pretrial discovery that Saccani was a postal inspector. During the hearings conducted by Judge Weber on the motions to dismiss by Litman and Portnoy, the role of Saccani was revealed. Judge Weber's hearings were conducted in February and March of 1981.

Meanwhile, Lichtenstein's retrial on 80-78A could not go forward, nor could his trial on 80-78B, because on December 24, 1980, he was seriously injured in an automobile accident and was disabled. Motions for Continuances were granted on this ground.

Judge Weber's order refusing to dismiss the indictment in the case before him resulted in a mandamus action and a direct appeal. The final decision of the Court of Appeals was filed on September 13, 1982. The record was returned on April 26, 1982.

Meanwhile, recognizing that the Litman decision might control the issue here, the defendant and the United States Attorney filed a stipulation on July 1, 1981, stating that

the ends of justice and the interests of economy of judicial time and resources, particularly in view of the defendant's physical condition, made a continuance appropriate until disposition of the Litman issue.

While no written motion has been found of record, the Motion to Dismiss here was the subject of a pretrial conference on May 25, 1982, and a hearing on the motion was held on August 9, 1982, which continued through August 11, 1982.

Proposed findings of fact and conclusions of law were filed in September 1982, and the motion is now ready for decision.

Based upon the record made by Judge Weber and the record of the hearings conducted here, we find that beginning in 1977, postal inspectors began an investigation of law firms and medical doctors in Pittsburgh to determine whether mail fraud was ongoing, in which medical bills were inflated by doctors at the request of lawyers for the purpose of enhancing settlements in personal injury cases, followed by the use of the mails.

On September 20, 1977, a grand jury was empanelled.

In October of 1977, a grand jury subpoena duces tecum secured for the grand jury and ultimately, the postal inspectors, certain records of the law firm of Lichtenstein and Bartiromo. Russel Siano, a competent postal inspector was in charge of the investigation.

On January 6, 1978, Sacanni was taken before the grand jury and appointed its agent "for the purpose of facilitating these investigations in obtaining insurance files for use in this investigation."

Sacanni did more than obtain insurance files. Although an employee of a private organization, he acted as a postal inspector. He carried credentials, which described him as a "special agent" of the ICPI and for a period in excess of two years he participated in reviewing documents which had been obtained by the grand jury subpoena. The documents were given to the postal inspector in charge, Russell Siano, who in turn, permitted Sacanni to review the documents in their entirety. Disclosure statements were filed under Rule 6(e) (3) (B) for the information delivered to Siano but none were filed for Sacanni. Sacanni had virtually all of the information which Siano had concerning the investigation.

Although the grand jury which appointed Saccani its agent expired on or about March of 1978, Sacanni continued to assist Siano during the two year period while several grand juries considered evidence. Based upon what was learned from the documents, Sacanni, using his credentials, interviewed clients, patients, law office secretaries and prepared memo's of the interviews. Several other postal inspectors were called in to assist because the investigation was extensive. Only Siano was qualified under Rule 6(e) (3) (B).

The grand jury subpoena was used to obtain from defendant's firm 90 checks relating to services provided by Dr. Matrozza, 30 involving Dr. Bisciglia, 20 involving Dr. Rosenbloom and 6 involving Dr. Dobrowalski. The documents were reviewed by Siano and Saccani extensively at Siano's office.

Saccani then helped Siano to prepare an affidavit for a search warrant for the law firm's offices.

The affidavit recited, in detail, that the documents had been obtained by the subpoena, that clients of the law firm had been interviewed (they were also patients of the

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doctors) and, in short, that there was good cause to believe that the firm had been obtaining documents from the doctors to support claims which were not genuine.

In fact, Saccani's daily diary for December 12, 1978, notes that he met with Siano and worked on documents and information for the search warrant and accompanied Siano to the United States Attorney's office to discuss the warrant.

The search was made on December 20, 1978, and Sacanni assisted the inspectors in reviewing documents seized in the search.

Meanwhile, he continued to interview witnesses who were to be taken before the grand jury, made notes of the interviews, was present while they were briefed just before their testimony and while they were debriefed after their testimony.

On June 18 and 19, 1979, he assisted Siano in preparing a final presentation letter to the United States Attorney, and organized the exhibits and proof-read the letter, and accompanied Siano to the United States Attorney's office to officially present the case.

Saccani had participated in interviewing most of the doctors, law firm secretaries, claimants, and other persons. Some 67 persons, exclusive of insurance adjusters, were interviewed and Saccani participated in about 41 of these interviews and he was present when almost all of the insurance adjusters were interviewed.

Lichtenstein was indicted by a grand jury empanelled on September 20, 1979. While Sacanni did not go into the grand jury room except as a witness, or review transcripts of testimony directly given to the grand jury, he knew of course, what each witness was going to say and what documents were to be presented because he knew as much about the investigation as Siano knew. Of course, Sacanni was striving to get indictments. He kept a chart of those persons investigated and those indicted and he indicated in red on his chart those indicted and he told his superior at ICPI that he looked forward to the day when all of his blocks were red. It is understandable that he sought success and apparently he was successful, but he became Siano's alter ego.

The presentation letter referred to above, which was prepared with the assistance of Sacanni, stated that the involvement of Doctors Cambotti, Bookert, and Napoleon was unknown to the authorities until the search of the law firm's offices had provided documents which, when analyzed, provided knowledge of the involvement. Sacanni, of course, reviewed these documents, which in due course, went to the grand jury where they were used eventually to indict the defendant, and Parisi, and Napoleon.

It has been represented that it was unknown to defense counsel, until the presentation letter was reviewed, that the involvement of Drs. Cambotti, Bookert and Napoleon was developed from the seizure of these documents. In his brief, the defendant states that this evidence will be the subject of a Motion to Suppress. We assume that the search warrant will be attacked because Sacanni helped to prepare it and because he had been given the grand jury documents upon which it was based, among other reasons.

We see no need to wait for the motion. Judge Weber concluded in his opinion that dismissal was too severe a remedy in the Litman-Portnoy proceeding, although he concluded that there had been repeated violations of Rule 6(e) (2) from and after August 1, 1977. The violations are the same in this proceeding.

Judge Weber concluded that the weight of authority would deny dismissal, that some cases refer to the sanction provided by the Rule and some were concerned whether prejudice to the defendant had resulted.

While, by hindsight, it might be stated that no prejudice to the defendant had occurred at the time the indictment was filed, these lengthy proceedings may have

created some prejudice of another kind. Dr. Cambotti is now deceased and two years have elapsed while memories have faded.

We agree with the opinions of Judges Weber and Cohill, but it is apparent that a Motion to Suppress, at least some of the evidence, if not all, will follow our refusal to dismiss. We decide now, therefore, on the basis of the lengthy records made that the anticipated Motion to Suppress should be granted as to a considerable portion of the evidence. That evidence would consist of the documents produced in compliance with grand jury subpoenaes, that evidence seized on the basis of the warrant for the law firm which Saccani helped prepare on the basis of the grand jury's documents, and the statements of the witnesses, whom he briefed or debriefed before or after they testified before the grand jury.

This result is not as severe as dismissal, but more severe than the sanction provided by the Rule. We are aware that it precludes retrial, as well as the trial of 80-78B.

While this memorandum was being prepared, the defendant filed yet another Motion, To Dismiss the Indictment for Failure to Comply with the Speedy Trial Act. We conclude that it is without merit, but requires no discussion in view of the result.

An order follows.

/s/ BARRON P. MCCUNE
United States District Court

ORDER

AND NOW, December 27, 1982, the sanction imposed for violation of Rule 6 (e)(2) is that the evidence in the form of documents produced in compliance with grand jury subpoenaes, and produced by the search of the law offices of Lichtenstein and Bartiromo, and procured from witnesses who were either briefed just before they testified before the grand jury or just after they testified, by the representative of the Insurance Crime Prevention Institute, named in the attached memorandum, shall be and is now suppressed.

The Motion to Dismiss the Indictment is denied.

The Motion to Dismiss for Violation of the Speedy Trial Act is denied.

/s/ BARRON P. MCCUNE
United States District Judge

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1. The first counts charged involvement of Lichtenstein, Parisi (an employee) Dr. Louis N. Napoleon, and Frank S. Matrozza, a physical therapist (not indicted).

Count No. 6 charged involvement of Lichtenstein, Parisi and Matrozza (not indicted) and Doctors Rosenbloom, Cambotti, Bookert and Bisceglia (doctors not indicted).

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff	)	Criminal Action
vs.	)	No. 78-20052-01
ARIEL HENRY TAGER, Defendant	)	

ORDER SUSTAINING DEFENDANT'S
MOTION TO DISMISS INDICTMENT

This case is before the Court on defendant's motion to dismiss the indictment. This is the second opportunity the Court has had to confront this motion.

In June of 1979, this Court overruled defendant's motion to dismiss the indictment. United States v. Tager, 506 F.Supp. 707 (D.Kan. 1979). In July, 1979, the Court sentenced defendant to a five-year prison term. The Tenth Circuit, however, reversed this Court on Appeal. United States v. Tager, 638 F.2d 167 (10th Cir. 1980). The United States moved for rehearing en banc, which was denied on October 6, 1981. The government then moved the Court to set a hearing regarding the disposition of

this case. The hearing was held on January 13, 1982. After considering the briefs and the argument at hearing, the Court is prepared to rule.

In a previous decision in this case, the Court, with great reservation, denied defendant's motion to dismiss the indictment. While the Court had grave doubts as to whether Rule 6(e) of the Federal Rules of Criminal Procedure allowed a court to order the disclosure of grand jury minutes to non-governmental persons, he deferred to the earlier ruling of Judge Rogers, who had allowed such disclosure. This Court explained why he believed Rule 6(e) did not extend to the disclosure in this case, but deferred to the Court of Appeals for final determination of of this legal question.

In its decision, the Tenth Circuit agrees with this Court's legal view that Rule 6(e), and its legislative history, did not give the trial court authority to order disclosure, but

set aside the final decision of Judge Rogers and this Court to the contrary, and reversed and remanded for further proceedings consistent with the views expressed in its opinion. United States v. Tager, 638 F.2d 167 (10th Cir. 1980).

In its Petition for Rehearing, p. 12, to the Tenth Circuit for rehearing en banc, the government stated:

> "It is the Government's understanding that this Court's reversal and remand requires the District Court to dismiss the case in order to comply with the mandate."

The Court agrees with the position originally taken by the Government and holds that the indictment must be dismissed without prejudice.

In his previous opinion, this Court discussed the hazards of allowing the Government to ignore the strictures of Rule 6(e):

> "Permitting the victim of a crime, or his agent, to participate in, coordinate and

> potentially direct a grand jury investigation into that crime raises serious problems. The policy could significantly impair the independence and impartiality required of the grand jury in the performance of its functions."

United States v. Tager, 506 F.Supp. at 726.

The Court notes that the Circuit Court apparently shared this Court's misgivings and explicitly relied to a large measure on this Court's analysis. United States v. Tager, 638 F.2d at 168.

This Court has been unable to discover any case law directly on point concerning the appropriate disposition of this case. He believes that the greater weight of analogous authority supports dismissal.

When Rule 6(d) is violated by the presence of unauthorized persons in the jury room, the general rule is per se dismissal of the indictment. United States. v. Furman, 507 F.Supp. 848 (D.Md. 1981); United States v. Braniff Airways, Inc., 428 F.Supp. 579 (W.D. Tex. 1977); United States v. Bowdach, 324 F.Supp. 123 (S.D. Fla. 1971). The Court notes

that while this case concerns a violation of Rule 6(e), not 6(d), disclosure to a nonauthorized person lacking in impartiality may impair the fairness and independence of the grand jury as much as the presence of an unauthorized person in the grand jury room.

In this case, Congress has placed a strict prohibition against disclosure in Rule 6(e), and declined to change 6(e) as to nongovernmental agents such as the one in this case. The intent of Congress and the protection of the privacy and fairness of the grand jury should be protected by dismissal. In United States v. Brodson, 528 F.2d 214 (7th Cir. 1975), the Court ordered dismissal when the government failed to obtain the required court approval for a wiretap and then gave the results of the tap to the grand jury. The Court noted that any exception from the broad language prohibiting wiretaps must be strictly construed in order to carry out the purpose of Congress, the protection of the privacy of the individual. Here, the Court must dismiss in

order to protect the fairness of the grand jury process, just as the Court believed the exceptions to Rule 6(e) must be strictly construed.

Dismissal can also be justified under the general supervisory power of the Court. In United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979), the Court upheld the dismissal of the indictment because of prosecutorial misconduct before the grand jury. The Court recognized that dismissal imposed important costs on the public, but noted that the costs of unchecked misconduct are also great, especially when the grand jury process is involved. While the misconduct in Serubo was much more reprehensible than the actions in this case, the potential for harm posed by private investigators being involved in grand jury proceedings is very great.

The government has cited cases where dismissal was not required. United States v. Carcaise, 442 F.Supp. 1209 (M.D. Fla. 1978), involved disclosure to a postal inspector, not a nongovernmental agent. United States v.

Appendix F

Dunham Concrete Products, Inc., 475 F.2d 1241 (5th Cir. 1973), involved disclosure to a government economist in an antitrust case. As noted previously, disclosure to outsiders, especially victims, imposes different and greater hazards of compromising the grand jury process than disclosure to other governmental personnel.

Finally, the Court notes the inconsistency of the government's positions before the Tenth Circuit and before this Court. First, the government represented to the Circuit that its decision required dismissal of the indictment. Then, the government tells this Court that dismissal is not required. The government's attempts to explain this inconsistency were woefully inadequate. While this Court would have reached the same result in the absence of the government's statement to the Circuit, this Court believes that the original frank assessment given the Circuit by the government strengthens this Court's decision.

Appendix F

This Court notes that while the dismissal is without prejudice, there may be further difficulties if the government obtains another indictment. These difficulties, which center on double jeopardy issues, are neither defined nor considered at this time, and are best left for consideration if and when they arise.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss the indictment in this case, without prejudice, is hereby sustained.

At Wichita, Kansas, this 22nd day of February, 1982.

/s/ FRANK G. THEIS

United States District Judge

Appendix G

Federal Rules of Criminal Procedure, Rule 6(e), 18 U.S.C.

Recording and Disclosure of Proceedings.

(2) General Rule of Secrecy. -- A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to -

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

No. 83-296

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT A. LEBOVITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATRICK COUGHLIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was entitled to post-conviction relief on the basis of his claim of a violation of Fed. R. Crim. P. 6(e)(2) in connection with the grand jury proceedings leading to his indictment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported. The opinion of the district court (Pet. App. 6a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1983. A petition for rehearing was denied on July 19, 1983 (Pet. App. 4a-5a). The petition for a writ of certiorari was filed on August 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on 13 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. Petitioner was sentenced to

concurrent terms of imprisonment of one year and one day, and was fined a total of $14,000. The court of appeals affirmed, *United States* v. *Lebovitz*, 669 F.2d 894 (3d Cir. 1982), and this Court denied certiorari, 456 U.S. 929 (1982). Thereafter, the district court denied petitioner's motion to dismiss the indictment or, in the alternative, for a new trial, based upon an alleged violation of the grand jury secrecy provisions of the Federal Rules of Criminal Procedure, Rule 6(e)(2) (Pet. App. 6a-39a). The court of appeals again affirmed, this time by an unpublished judgment order (Pet. App. 1a-3a).

1. The evidence at petitioner's trial established that petitioner, an attorney, participated in a scheme to defraud various insurance companies by submitting inflated medical bills, procured from physicians cooperating in the scheme, to the victimized companies, on behalf of personal injury claimants petitioner represented. See 669 F.2d at 895. On May 3, 1982, following exhaustion of avenues for direct review of his conviction, petitioner filed his motion in district court for dismissal of the indictment, or, in the alternative, a new trial, citing newly discovered evidence allegedly establishing a violation of the grand jury secrecy requirement of Fed. R. Crim. P. 6(e)(2) in connection with the grand jury proceedings leading to his indictment. The basis for the motion was the assistance given to United States postal inspectors investigating the subject fraudulent activities by Daniel Saccani, an agent of the Insurance Crime Prevention Institute (ICPI), a private investigative agency funded by the insurance industry.

After evidentiary hearings on petitioner's motion, the parties stipulated to certain facts (Pet. App. 10a-14a) and the district court made additional findings of fact (*id.* at 14a-21a). The evidence disclosed that: (1) Saccani had access to files from which some documents were presented

to the grand jury and shown to grand jury witnesses (*id.* at 10a-13a); (2) Saccani, through his relationship with the postal inspectors, was aware of the progress of the investigation against petitioner and had accompanied and assisted the postal inspectors conducting interviews of several potential grand jury witnesses (*id.* at 17a, 19a); and (3) Sacanni assisted postal inspectors in preparing materials for a "letter of presentation" to the Assistant United States Attorney concerning the investigation and also assisted in identifying and locating witnesses, serving subpoenas and labeling documents for identification (*id.* at 18a).

On the other hand, the district court also found that (1) Saccani was never present in the grand jury room; (2) Saccani at no time read a transcript of any grand jury testimony, or a summary of such testimony; (3) Saccani never had any discussions with anyone concerning what had transpired before the grand jury; and (4) Saccani did not present any information to the grand jury or make any decisions concerning the information to be presented to the grand jury (Pet App. 19a-20a.)

2. Based upon the foregoing findings of fact, the district court denied petitioner's motion to dismiss the indictment or for a new trial. The court concluded that neither Saccani nor any of the agents of the grand jury (the postal inspectors or the federal prosecutors) committed any violation of the rule of grand jury secrecy (Pet. App. 21a). Relying upon *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960), and its progeny, the court noted that Saccani's access to information obtained from sources independent of the grand jury was not regulated by Fed. R. Crim. P. 6(e)(2) and that his access to documents subsequently submitted to the grand jury did not reveal "matters occurring before the grand jury" (Pet. App. 22a, 24a-27a). The district court noted that the actual testimony of witnesses appearing before the grand jury was not disclosed to

Saccani (*id.* at 23a, 27a). In addition, the district court concluded that no prosecutorial misconduct had occurred in connection with the grand jury proceedings (*id.* at 23a), that Saccani's assistance to postal inspectors did not improperly influence the grand jury (*id.* at 21a, 27a-29a), that petitioner had suffered no prejudice resulting from Saccani's activities (*id.* at 23a, 29a, 30a-31a), and that petitioner had been "indicted by an impartial and unbiased grand jury" (*id.* at 22a). The court of appeals affirmed by judgment order (*id.* at 1a-3a).

ARGUMENT

Petitioner contends that the government violated Fed. R. Crim. P. 6(e)(2), by disclosing grand jury materials to Saccani during the investigation leading to petitioner's indictment. In the circumstances of this case, this claim — even if founded —would provide no basis for setting aside petitioner's conviction. In any event, contrary to petitioner's contention, the decision in this case does not conflict with *United States* v. *Tager*, 638 F.2d 167 (10th Cir. 1980), for, as the district court determined, there was simply no disclosure of grand jury materials in this case.

1. We note, initially, that the claim raised by petitioner alleging a violation of Rule 6(e) during the grand jury proceedings leading to his indictment would not, even if legally sound, afford any basis for collateral attack upon his judgment of conviction. Petitioner did not identify any procedural basis for his application (see C.A. App. 8A-17A). Petitioner's motion was, however, styled alternatively a motion for a new trial and a motion to dismiss the indictment. A motion for a new trial is ordinarily required to be filed within seven days of the finding of guilt, but may be made within two years of judgment, after the conclusion of appellate review, if the basis for the motion is newly discovered evidence. Fed. R. Crim. P. 33. Petitioner evidently relies on the latter branch of the rule. See page 2, *supra*;

C.A. App. 8A-9A. But we know of no authority for seeking a new trial under Rule 33 where the newly discovered "evidence" has no bearing upon the issues decided at trial and has nothing whatever to do with the guilt or innocence of the defendant. Compare *United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976). Alternatively, assuming that petitioner's application to the district court could be viewed as a motion pursuant to 28 U.S.C. 2255, relief upon his nonconstitutional claim is barred because the asserted violation of Rule 6(e)(2) does not, even by the wildest stretch of the imagination, entail " 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962). See *United States* v. *Addonizio*, 442 U.S. 178, 185-187 (1979); *United States* v. *Timmreck*, 441 U.S. 780 (1979).

2. Even if petitioner's application were properly before the district court and a violation of Rule 6(e) were established in this case, petitioner would nevertheless be entitled neither to the dismissal of the indictment nor to the grant of a new trial.[1] Rule 6(e)(2) unambiguously provides that a "knowing violation of Rule 6 may be punished as a contempt of court." Thus, the courts of appeals have generally held that contempt is the normal remedy for breaches of grand jury secrecy. See *United States* v. *Stone*, 633 F.2d 1272, 1275 (9th Cir. 1979); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 219 (5th Cir. 1980); *United States* v. *Malatesta*, 583 F.2d 748, 753 (5th Cir. 1978), modified on other grounds, 590 F.2d 1379, cert. denied, 440 U.S. 962 (1979); *United States* v. *Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966); *United States* v. *United*

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[1] A new trial is plainly an inappropriate response to an alleged violation of the rule of grand jury secrecy.

States District Court, 238 F.2d 713, 721-722 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957). At the very least, "[d]ismissal of an indictment is required only in cases in which the grand jury has been flagrantly overreached or deceived in some significant way." *Stone*, 633 F.2d at 1274. Here, however, the district court specifically found that there had been no prosecutorial misconduct and no demonstrable prejudice to petitioner (Pet. App. 22a-23a).

As an additional ground for its decision, the district court observed that a supervisory power dismissal of an indictment ordinarily is unwarranted absent a showing of prejudice to the defendant flowing from the allegedly improper prosecutorial conduct (Pet. App. 30a-31a). Citing *United States* v. *Serubo*, 604 F.2d 807, 817 (3d Cir. 1979), and *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972), petitioner claims (Pet. 45) that dismissal may be a proper remedy even absent a showing of prejudice to the defendant. But the cited cases both involved practices with inherent potential to affect the deliberations of the grand jury: prosecutorial comments upon the veracity of grand jury witnesses giving testimony exclulpating the target along with comments, lacking an evidentiary foundation, linking the target with organized crime (*Serubo*), and presentation of hearsay testimony in circumstances that might mislead the grand jury into thinking that the testimony was that of an eyewitness (*Estepa*). Here of course, the grand jury was in no way exposed to the alleged violation; a technical breach of Rule 6(e)(2) occurring outside the confines of the grand jury is inherently unlikely to affect grand jury deliberations. Moreover, to the extent the cited decisions might stand for a broad rule dispensing with any showing of prejudice, their vitality is questionable in the aftermath of *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-10, and *United States* v. *Morrison*, 449 U.S. 361 (1981).

In any event, there is no reason to believe that the Second Circuit would have decided this case differently from the court below, for there was no evidence of persistent prosecutorial misconduct in this case such as was perceived in *Estepa*. See 471 F.2d at 1137; see also *United States* v. *Artuso*, 618 F.2d 192, 197 (2d Cir. 1980). *Serubo*, moreover, rests upon repeated examples of egregious prosecutorial misconduct (see 604 F.2d at 810-818) that have no analogue here. The court of appeals' decision in this case obviously reflects its view that its prior decision in *Serubo* is not controlling here.

3. Unlike *United States* v. *Tager*, *supra*, there was no arguable violation of Rule 6(e)(2) here. In *Tager*, the district court had authorized the disclosure of grand jury materials to an ICPI investigator who was assisting postal inspectors and prosecutors pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), which authorizes disclosure of such matters "preliminarily to or in connection with a judicial proceeding." As the prosecutor conceded in that case, grand jury materials, including transcripts of witnesses' testimony, were made available to the private investigator pursuant to the district court's order (638 F.2d at 169). The Tenth Circuit observed that the ICPI investigator was not a government employee authorized to receive such disclosure under Fed. R. Crim. P. 6(e)(3)(A)(ii) and that the disclosure of grand jury transcripts rendered the rule of *United States* v. *Interstate Dress Carriers, Inc.*, *supra*, inapposite (638 F.2d at 169). The court rejected the government's contention that the disclosure was properly directed "preliminarily to or in connection with a judicial proceeding" pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i), reasoning that the grand jury proceeding itself could not serve as the "judicial proceeding" for this purpose (638 F.2d at 169-171).

Here, by contrast, the district court did not hold that disclosure was permitted under Rule 6(e)(3)(C)(i); indeed, as respondent acknowledges (Pet. 32-33), the government did not seek authorization to disclose grand jury materials to Saccani on the basis of Rule 6(e)(3)(C)(i) or any other provision of law. Instead, because the record established that Saccani never entered the grand jury room, never reviewed grand jury transcripts or summaries of grand jury testimony, and because "[t]he documents and files obtained and observed by Saccani did not reveal the essence of what took place in the grand jury room or anything about the grand jury investigation" (Pet. App. 22a), the district court held that there had been no disclosure of grand jury materials.

Subject to the exceptions recognized in Rule 6(e)(3), Fed. R. Crim. P. 6(e)(2) establishes a "general rule of (grand jury) secrecy" prohibiting disclosure of "matters occurring before the grand jury." See *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 6-8. But it is well established that the mere fact that a document is reviewed by a grand jury does not convert it into a "matter[] occurring before the grand jury" for purposes of this prohibition. *In re Grand Jury Investigation (N.J. State Comm'n of Investigation)*, 630 F.2d 996, 1000-1001 (3d Cir. 1980); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1382-1383 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); *United States* v. *Stanford*, 589 F.2d 285, 291 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d at 54. Here, ICPI investigator Saccani was permitted access to documents obtained by postal inspectors independent of the grand jury proceedings. Most of the information Saccani obtained concerning the investigation had been voluntarily turned over to the postal inspectors or to him directly (Pet. App. 13a, 16a). Other documents examined by Saccani had been seized pursuant

to search warrants and had not been obtained by grand jury subpoenas (*id.* at 13a). In such cases the courts have held that Rule 6(e) does not apply because these documents exist independent of the grand jury investigation, even if developed with an eye towards use in the grand jury. See *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982); *In re Grand Jury Investigation*, 630 F.2d at 1000. Because the Tenth Circuit recognized the "*Dress Carriers*" doctrine in *Tager* (638 F.2d at 169), and held it inapplicable only because the ICPI investigator there had been given access to grand jury transcripts, the decision below does not conflict in any respect with *Tager*.

Petitioner also contends (Pet. 17, 34) that because Saccani was present at interviews of witnesses prior to their grand jury testimony, he acquired information protected by Rule 6(e). But Rule 6(e) imposes no constraints of secrecy on grand jury witnesses. *In re Eisenburg*, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 217 (5th Cir. 1980); *United States* v. *Radetsky*, 535 F.2d 556, 559 (10th Cir.), cert. denied, 429 U.S. 820 (1976). Interviews conducted outside the grand jury room and prior to the time a witness testifies before the grand jury do not reveal the grand jury proceedings themselves and are not subject to Rule 6(e) (see Pet. App. 30a). *Clavir* v. *United States*, 84 F.R.D. 612, 614 (S.D.N.Y. 1979).[2]

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[2]Saccani testified that he never discussed whether or not there had been inconsistencies between the witnesses' grand jury testimony and their earlier statements, and the district court noted that no transcripts had been disclosed (C.A. App. 212-213, 223-224). Because pre-grand-jury statements were not themselves presented to the grand jury in any fashion, this case is distinguishable from *In re Grand Jury Matter (Garden Court Nursing Home, Inc., & Sidney D. Simon)*, 697 F.2d 511 (3d Cir. 1982) (summaries of witness interviews conducted outside of grand jury room presented to the grand jury), upon which petitioner relies (Pet. 35). Compare also *In re Special February 1979 Grand Jury (Baggot)*, 662 F.2d 1232, 1237-1238 (7th Cir. 1981) (prepared statement

In sum, because no grand jury materials were disclosed to Saccani, the secrecy requirement of Rule 6(e)(2) was not violated in any respect.[3] Petitioner acknowledges (Pet. 35) that the Third Circuit has generally given the rule of grand jury secrecy "the high priority and importance which it deserves." Accordingly, no further review of the fact-bound ruling in this case is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATRICK COUGHLIN
Attorney

NOVEMBER 1983

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from prior interview read by witness to the grand jury), aff'd, No. 81-1938 (June 30, 1983). As the Seventh Circuit observed in *Baggot* (662 F.2d at 1244), substantial deference is due to the determination of the trier of fact as to whether disclosure of statements or documents made or secured outside grand jury proceedings would compromise grand jury secrecy. The district court's careful assessment of the relationship between Saccani's activities and the grand jury proceedings in this case merits such deference.

[3]Nor is there any indication in the record that witnesses subpoenaed before the grand jury were improperly influenced by ICPI investigator Saccani (see Pet. App. 23a).